Jurisdictional Statement

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

VINCENT ROBINSON, APPELLANT

V.

COMMONWEALTH OF PENNSYLVANIA, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA (PENNSYLVANIA SUPREME COURT NO. 236, JANUARY TERM, 1979)

JURISDICTIONAL STATEMENT

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I. QUESTION PRESENTED

1. Should Not The Pennsylvania Statute, 18 Pa.C.S. §3102, Be Declared Unconstitutional As Being Violative Of The Right To Due Process Of Law Under The Federal Constitution, Since It Absolutely Prohibits A Defendant In A Statutory Rape Prosecution In Pennsylvania From Presenting A Defense Of A Reasonable Belief That The Consenting Complainant Was Of Sufficient Age Under The Law To Consent To Sexual Intercourse, Thus Creating A Strict Liability Felony Offense With A Maximum Penalty Of Ten Years Imprisonment Without Any Proof Of Mens Rea Or Culpability?

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IV. OPINIONS IN COURTS BELOW

The majority opinion of the Pennsylvania Supreme Court affirming appellant's judgment of conviction and sentence, as well as the dissenting opinion on behalf of three Pennsylvania Supreme Court justices, both issued on December 30, 1981, are collectively attached as Exhibit "A" in the Appendix. These opinions are reported as Commonwealth of Pennsylvania v. Robinson, Pa., 438 A.2d 964 (1981). Exhibit "B" is the opinion of the lower appellate court, the Superior Court of Pennsylvania, of March 16, 1979, affirming appellant's judgment of conviction and sentence. This opinion is reported as Commonwealth v. Robinson, 264 Pa. Super. 345, 399 A.2d 1084 (1979). The opinion of the trial court judge of the Common Pleas Court of Philadelphia in support of his denial of post-verdict relief was issued on November 25, 1977, is unreported, and is attached as Exhibit "C".

V. GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Supreme Court of Pennsylvania, affirming appellant's judgment of conviction and sentence was entered on December 30, 1981, and held that 18 Pa.C.S.A. §3102, a Pennsylvania statute, was not unconstitutional on its face or as applied as being violative of the due process clause of the Fourteenth Amendment of the United States Constitution.

A notice of appeal to this Court was filed in the Supreme Court of Pennsylvania and in the Common Pleas Court of Philadelphia on February 24, 1982, and these are attached as Exhibits "D" and "E" respectively.

This appeal is being docketed in this Court within 90 days from the Pennsylvania Supreme Court's affirmance of appellant's judment of sentence. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

VI. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN APPEAL

18 Pa.C.S.A. §3102

§3102. Mistake as to age

Whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the actor did not know the age of the child, or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age other than 14 years, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age.

18 Pa.C.S.A. §103

§103. Definitions

Subject to additional definitions contained in subsequent provisions of this title which are applicable to specifc parts, articles, chapters or other provisions of this part, the following words and phrases, when used in this title shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

* * * * * * *

"Reasonably believes" or "reasonable belief." A belief which the actor is not reckless or negligent in holding.

18 Pa.C.S.A. §3122

§3122. Statutory rape

A person who is 18 years of age or older commits statutory rape, a felony of the second degree, when he engages in sexual intercourse with another person not his spouse who is less than 14 years of age.

18 Pa.C.S.A. §1103(2)

§1103. Sentence of imprisonment for felony

A person who has been convicted of felony may be sentenced to imprisonment as follows:

* * * * * * *

(2) In the case of a felony of the second degree, for a term which shall be fixed by the court at not more than ten years.

United States Constitution Fourteenth Amendment, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VII. STATEMENT OF THE CASE

Appellant, Vincent Robinson, was arrested by Philadelphia, Pennsylvania police on January 3, 1977, and charged in connection with an incident occuring on January 1, 1977 involving Harriet Saunders. He was held for court following a preliminary hearing, and the Philadelphia District Attorney returned Informations against him at January Term, 1977, charging him with statutory rape (No. 1068), involuntary deviate sexual intercourse (No. 1069) and indecent assault (No. 1070).

Appellant was tried before the Honorable Charles Lord in Philadelphia Common Pleas Court on April 6, 1977, sitting without a jury, after appellant waived his right to a jury trial.

There was little factual despute in the trial of the case. The prosecuting witness testified that although she was thirteen and one-half years old, six months less than the age of consent, she had given the eighteen year old appellant, Vincent Robinson, a false name and told him she was sixteen years of age before freely engaging in sexual intercourse with him. The statutory rape statute, 18 Pa.C.S.A. §3122, under which Vincent Robinson was prosecuted, makes an individual over the age of 18 who has sex and relations with another under the age of 14, guilty of a felony and subjects that individual to a potential prison term of ten years.

After the Commonwealth rested, the defense demurred to all the charges. The trial judge sustained the demurrer to the charges of involuntary deviate sexual intercourse and indecent assault, but overruled the demurrer to the charge of statutory rape. In doing so, the judge rejected the claim made on this appeal, that 18 Pa.C.S.A. §3102 was unconstitutional because it violated due process of law.

Yvonne Smith, who had been called by the prosecution, was then called by the defense, and testified that her brother, appellant, had a reputation for good character in the community, and that he was employed and was also a member of the military reserve (N.T. 3133). The defense then rested, and after argument (unrecorded) by counsel, the judge found defendant guilty of statutory rape.

Thus this case squarely presents a situation in which Vincent Robinson was prevented from asserting the defense that he was led to believe and in fact reasonably did believe that he was committing no violation of the law when he engaged in a voluntary physical relationship with a girl who had told him, and who he believed, was sixteen years of age.

Appellant filed timely written post-verdict motions and a memorandum in support of those motions raising the issue involved in this appeal, among others, and on September 26, 1977, the trial judge denied post-verdict relief and sentenced defendant to a term of two years probation on the statutory rape conviction.

A timely appeal was then filed in the Superior Court of Pennsylvania, with the case being submitted on briefs. Appellant's brief specifically raised the claim of the constitution invalidity of 18 Pa.C.S.A. §3102 under the due process clause, the claim raised on this appeal. On March 16, 1979, the Superior Court affirmed appellant's judgment of conviction and sentence. Appellant then filed a timely written petition for allowance of appeal to the Pennsylvania Supreme Court specifically raising the constitutional claim involved in this appeal, and on June 1, 1979, the Pennsylvania Supreme Court, by per curiam order granted the petition for allowance of appeal. The claim of the constitutional invalidity of 18 Pa.C.S. §3102 under the due process clause

of the United States Constitution was then specifically raised again in appellant's brief, and at oral argument before the Pennsylvania Supreme Court. On December 30, 1981, by a four to three decision, the Pennsylvania Supreme Court affirmed appellant's judgment of conviction and sentence. The three dissenting justices dissented on the ground that they would hold 18 Pa.C.S.A. §3102 unconstitutional as being violative of the due process clauses of the United States and Pennsylvania Constitutions.

VIII. THE QUESTION PRESENTED IS SUBSTANTIAL

This case presents the substantial fundamental question of whether the due process clause places any limitations on a state's power to impose criminal sanctions on the basis of strict criminal liability, and if so, what those limitations are.

Because of the operation of 18 Pa.C.S.A. §3102, which prohibits any defense of a reasonable mistake of age in a statutory rape prosecution in Pennsylvania, appellant, an eighteen year old boy, was convicted of a serious felony carrying a maximum penalty of ten years imprisonment* on the basis of strict criminal liability without any showing of criminal intent, negligence or recklessness.** See 18 Pa.C.S.A. §103. That this is a significant question is clear from the closely divided decision of the Pennsylvania Supreme Court, where three of the seven justices dissented on the grounds that "a felony conviction, carrying the possible penalty of a lengthy prison term, without a finding of criminal intent is unduly harsh and offensive to the due process protections of both the Pennsylvania and United States Constitution." Commonwealth v. Robinson, Pa., 438 A.2d 964, 968 (1981).

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* See 18 Pa.C.S.A. §3122; 18 Pa.C.S.A. §1103(2). Appellant was sentenced to a term of probation of two years. Under Pennsylvania law if he then violated any of his conditions of probation, during his term of probation, he could be sentenced to up to the ten years imprisonment after a revocation of probation. See Commonwealth v. Colding, 482 Pa. 112, 393 A.2d 404 (1978).

** It is undisputed from the record, at trial, established by the complainant's testimony, that she had consensual sexual intercourse with appellant after meeting him, giving him a false name, and misrepresenting her age as being sixteen years old. The complainant, it turned out, was in fact thirteen and a half years old, and Pennsylvania's statutory rape law defines the offense as essentially as one individual at least eighteen years old having sexual intercourse with another individual less than fourteen years old. The relief requested is a new trial where appellant would be permitted to present the defense of a reasonable mistake of age since the trial judge had ruled at the completion of the Commonwealth's case that he would not consider such a defense because it was prohibited by 18 Pa.C.S.A. §3102, the statute counsel now seeks to have declared unconstitutional.

In the past this Court has noted that the constitutional power of both the states and Congress to enact criminal statutes on the basis of strict liability without any element of scienter is probably not limitless and that such statutes would raise a substantial due process question if not directed at the regulation and possession of dangerous and noxious materials such as hand grenades, drugs, and sulfuric acid. United States v. International Minerals & Chemical Corp., 402 U.S. 558, 564-65, 91 S.Ct. 1697, 1701 (1971); Smith v. People, 361 U.S. 147, 150, 80 S.Ct. 215, 217 (1959); see Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240 (1952). However, the substantive due process question presented by this appeal has not squarely been decided.

This Court has held that due process requires that the standard to be applied in evaluating the sufficiency of the evidence at state trials must be one of proof beyond a reasonable doubt,* and that due process of law requires that a state conviction be reversed if insufficient evidence was presented to justify a rational trier of fact in finding that every element of the crime had been established beyond a reasonable doubt.** As commentators have emphasized, constitutional protections such as these are meaningless if there are not also some substantive due process limitations on a state defining a criminal offense to make an act a crime without requiring proof of mens rea or culpability. Saltzman, Strict Criminal Liability And The United States Constitution: Substantive Criminal Law Due Process, 24 Wayne L. Rev. 1571, 1626, 1637 (1978). See Hart, The Aims Of The Criminal Law, 23 Law & Contemporary Prob. 401, 431 (1958).

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* In Re Winship, 397 U.S. 458, 364, 90 S.Ct. 1068, 1072-73 (1970).

** Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979).

In interpreting what procedural constitutional protections an accused is entitled to, such as the right to jury trial and the right to counsel, this Court has considered the severity of the actual or potential penalty involved in the prosecution to be controlling or significant, in holding that accused are entitled to these constitutional protections for all but petty offenses. Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006 (1972); Baldwin v. New York, 399 U.S. 66, 68-69, 90 S.Ct. 1886, 1888 (1970); Duncan v. Lousiana, 391 U.S. 145, 88 S.Ct. 1444 (1968). In recent years many courts have observed that the due process clause would also seem to render invalid a statute that had the effect of permitting conviction for a felony carrying a potential prison term of many years imprisonment on the basis of strict criminal liability without proof of of any mens rea.* See United States v. Heller, 579 F.2d 990, 994 (6th Cir. 1978); United States v. Erne, 576 F.2d 212, 214-15 (9th Cir. 1978); Robey v. State, 611 P.2d 209, 210 (Nev. 1980); State v. Guest, 583 P.2d 836, 838-39 (Alaska 1978); Walker v. Alabama, 356 So. 2d 672 (Ala. 1977); Watson Seafood & Poultry Company v. Thomas, 289 N.C. 7, 15, 220 S.E. 2d 536, 542 (1975). Contra, Nelson v. Moriarity, 484 F.2d 1034 (1st Cir. 1973); Goodrow v. Perrin, 403 A.2d 864 (N.H. 1979). Justice Blackmun while still a circuit judge for the Eighth Circuit, after reviewing this Court's previous decisions, noted in upholding the constitutional validity of a criminal statute that carried a maximum penalty of six months imprisonment, that he viewed elimination of intent in a criminal statute as not being violative of the due process clause if certain factors were present, including a statutory "penalty [that]

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* This recognizes the principle that the potential severity of the result is an important factor to consider in determining what process is due, and the greater the penalty which may be imposed the more is due. See Angel, Substantive Due Process And The Criminal Law, 9 Loyala Univ. Chic. L.J. 61, 85 (1978).

is relatively small, where conviction does not gravely besmirch..." Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960).

Appellant has been convicted of a very serious felony, carrying a potential ten years imprisonment which has gravely besmirched his reputation, and this Court should now decide whether a state statute which imposes such criminal punishment on the basis of strict liability without any proof of mens rea or culpability comports with the Fourteenth Amendment's due process clause.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

JOHN W. PACKEL, Assistant Defender
Chief, Appeals Division

Appendix

COMMONWEALTH of Pennsylvania,

v.

Vincent ROBINSON, Appellant.

Supreme Court of Pennsylvania.

Argued Oct. 26, 1981.

Decided Dec. 30, 1981.

Defendant was convicted in the Court of Common Pleas, Criminal Trial Division, Philadelphia, No. 1068 January Session 1977, Charles A. Lord, J., and he appealed. The Superior Court, No. 2500 October Term, 26 Pa.Super. 345, 399 A.2d 1084, Edmund Spaeth, J., affirmed, and defendant appealed. The Supreme Court, No. 236 January Term, 1979, Nix, J., held that: (1) testimony of defendant's sister as to defendant's age was sufficiently reliable and consistent to sustain conviction, and (2) statutory rape statute which denied defendant defense as to mistake or misrepresentation as to victim's age did not deny defendant due process.

Affirmed.

Kauffman, J., dissented and filed opinion in which Larsen and Flaherty, JJ., joined.

1. Criminal Law ⇐1159.2(1)

Evidence otherwise sufficient will be found insufficient only if it is patently unreliable.

2. Rape ⇐52(1)

In prosecution for statutory rape, testimony of defendant's sister was sufficiently reliable and consistent on question of defendant's age to sustain conviction. 18 Pa. C.S.A. § 3102.

3. Constitutional Law ⇐48(1)

Legislative enactments are clothed with presumption of constitutional validity.

4. Constitutional Law ⇐251.3

Touchstone of due process is protection of individual against arbitrary action of government. U.S.C.A.Const.Amend. 14.

EXHIBIT "A"

5. Constitutional Law ⇐258(5)
Rape ⇐2

Statutory rape statute which denied defense of mistake or misrepresentation as to victim's age did not deny defendant due process since legislature could rationally require that one who engages in sexual intercourse with child below 14 years of age does so at his own peril. 18 Pa.C.S.A. § 3102; Const.Art. 1, § 9; U.S.C.A.Const.Amend. 14.

John W. Packel, Chief, Appeals Div., Leonard N. Sosnov, Philadelphia, for appellant.

Robert B. Lawler, Chief, Appeals Div., Steven Cooperstein, Philadelphia, for appellee.

Before O'BRIEN, C. J., and ROBERTS, NIX, LARSEN, FLAHERTY, KAUFFMAN and WILKINSON, JJ.

OPINION

NIX, Justice.

This is an appeal, by allowance, from the Superior Court which unanimously affirmed the appellant's conviction for statutory rape.[1]

The pertinent facts are as follows. Harriet Saunders, the complainant, testified at trial that she was born on July 23, 1963, making her 13 years old at the time this incident took place on January 1, 1977. The complainant further testified that she consented to have sexual intercourse with the appellant at his home some time during the evening hours and that after leaving the appellant's home, she went to her girlfriend's house, and from there to Thomas Jefferson University Hospital. The Commonwealth called appellant's sister, Yvonne Smith, for the purpose of proving appellant's age. She testified that she had personal knowledge that appellant was over 18 on January 1. As a foundation for this testimony, she stated that she was 19 years older than the appellant; that she was not present at his birth, but saw him three days later on November 12 or 13, 1958; that he was born in Abington Hospital; and finally, that his mother's name was Doris and his father's name, Emanuel. On cross-examination, she conceded that her estimation of appellant's age was an "approximation," based on how long she thought he had been out of school. Later in the trial, appellant's counsel recalled Mrs. Smith as a witness on appellant's behalf and she testified that: "his birthday is November 9th of this year [1977]. He should be 19, I guess."

The appellant was found guilty of statutory rape after a trial before the Honorable Charles A. Lord, sitting without a jury, on April 6, 1977, and was sentenced to two years probation on September 26, 1977. The appellant appealed to the Superior Court, which affirmed in an unanimous opinion authored by Judge Spaeth. *Commonwealth v. Robinson*, 264 Pa.Super.Ct. 345, 399 A.2d 1084 (1979).

In this appeal, the appellant asserts (1) that the Commonwealth failed to prove beyond a reasonable doubt that he was over 18 on the date of the incident, and (2) that Section 3102 of the Criminal Code is unconstitutional because it does not allow the appellant to prove that he labored under a reasonable mistake of fact as to the age of the victim. On this second contention, he further argues that he should receive a new trial because he was convicted on this felony on the basis of strict criminal liability without proof of *mens rea* or culpability in violation of his right to due process of law as guaranteed by Article 1, Section 9 of the Pennsylvania Constitution and the Fourteenth Amendment of the United States Constitution.

As to the appellant's first claim, sufficiency of the evidence, the sole argument advanced by the appellant is that the testimony produced to show that appellant was over 18 years old at the time of the incident was so weak and inconclusive as to be insufficient as a matter of law to establish that

1. 18 Pa.C.S.A. § 3102 reads:

Whenever in this chapter [chapter 31] the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the actor did not know the age of the child, or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age other than 14 years, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age.

he was older then eighteen. This claim is conspicuously groundless.

[1, 2] This Court has made it clear that evidence otherwise sufficient will be found insufficient only if it is *patently* unreliable. *Commonwealth v. Hudson*, 489 Pa. 620, 414 A.2d 1381 (1980); *Commonwealth v. Whack*, 482 Pa. 137, 393 A.2d 417 (1978). The testimony of Yvonne Smith, the appellant's sister, was sufficiently reliable and consistent to allow the factfinder to determine that the defendant was older than 18 years of age. Her responses to questions concerning the appellant's age were thoughtful and based on her recollection of facts. The mere addition of the words "I guess" by the witness to her last answer, after stating once again that the appellant would be 19 in 1977, does not render her testimony fatally unreliable under the holding stated in *Commonwealth v. Farquharson*, 467 Pa. 50, 354 A.2d 545 (1976). Since her use of the expression "I guess" did not require the factfinder to conjecture to what the appellant's age was and since it was for the factfinder to appraise the extent of this qualification, her testimony was sufficient to support the factfinder's verdict with reason and not surmise. Thus, it is readily apparent that the evidence produced at trial was sufficient to sustain appellant's conviction.

[3] The appellant's second argument is as equally unfounded as his first. It is well settled that legislative enactments are clothed with a presumption of constitutional validity. *National Wood Preserves, Inc. v. Commonwealth, Department of Environmental Resources*, 489 Pa. 221, 414 A.2d 37 (1980). In requesting this Court to find that 18 Pa.C.S.A. § 3102, a duly enacted statute, is unconstitutional in that it was afoul of Article I, § 9 of the Pennsylvania Constitution,[2] the appellant carries the heavy burden of demonstrating that the statute clearly, palpably, and plainly violates the Constitution. *Wajert v. State Ethics Commission*, 491 Pa. 255, 262 n. 6, 420 A.2d 439 (1980); *In re Williams L.*, 477 Pa. 322, 382 A.2d 1228 (1978); *Daly v. Hemphill*, 411 Pa. 263, 191 A.2d 835 (1963). Because the appellant has failed to meet the burden of proving that § 3102 of the Crimes Code clearly contravenes the right to due process of law, there is no basis for a finding of constitutional invalidity.

[4] The touchstone of due process is protection of the individual against arbitrary action of the government. *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974). The operation of § 3102 to bar the defense of age in the case of statutory rape cannot be said to be an arbitrary law. In an exercise of its police powers, the legislature rationally may require that one eighteen years of age or older who engages in sexual intercourse with a child below fourteen years of age does so at his own peril. Such activity may be punished criminally if the child is indeed under fourteen years. In that event, a defendant may be denied the defense as to mistake or misrepresentation as to the child's age.

[5] The primary consideration in prohibiting unlawful, consensual intercourse with an underage female has been traditionally attributed to the legislative desire to protect those who are too unsophisticated to protect themselves. *Commonwealth v. Walker*, 468 Pa. 323, 335, 362 A.2d 227, 232 (1976). Although due process considerations impose some limitations on the absence of a knowledge requirement from the definition of a criminal offense, *see, e.g., Lambert v. California*, 355 U.S. 225, 78 S.Ct.

2. Article I, § 9 reads:

> In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land.

240, 2 L.Ed.2d 228 (1957), due process does not require that the appellant be afforded the defense of mistake of the victim's age in a statutory rape prosecution.[3] Thus, the Pennsylvania legislature, in line with a substantial majority of legislatures which have addressed this issue, has determined that it will not provide for a reasonable mistake of age as a defense.[4] As such, the appellant is not entitled to relief.[5]

Judgment of Sentence Affirmed.

KAUFFMAN, J., filed a dissenting opinion in which LARSEN and FLAHERTY, JJ., joined.

3. *Commonwealth v. Koczwara*, 397 Pa. 575, 155 A.2d 825 (1959), *cert. denied* 363 U.S. 848, 80 S.Ct. 1624, 4 L.Ed.2d 1731 (1960), clearly does not mandate a different result. As noted by the Superior Court in its opinion in the instant case, *Koczwara* held that a bar owner could not be imprisoned where he was *vicariously* liable for the act of an employee. Here, by contrast, there is no question of appellant's liability for actions of anyone else. He was held liable for his own actions only. *Commonwealth v. Robinson*, *supra* 264 Pa.Super. at 351, 399 A.2d 1084. Thus, *Koczwara* does not aid appellant's constitutional claim.

4. Numerous jurisdictions have enacted into law statutes which uphold the common law notion that reasonable mistake of age is not a defense to a charge of statutory rape. These are: Colorado (C.R.S. § 18–3–406(1); Indiana (I.S.A. § 35–42–4–3(e); Maine (17A M.R.S.A. § 252); Minnesota (M.S.A. § 609.342(a); Washington (R.C.W.A. § 9A.44.030). The following states have also removed the defense by legislative enactment: Florida (F.S.A. § 794.021); Louisiana (L.S.A.–R.S. § 14:80); Missouri (V.A.M.S. § 566.020); Montana (M.S.A. § 94–5–506(1); Ohio (O.R.C.A. § 2907.02(A)(3); Oregon (O.R.S. § 163.325(1); Wyoming (W.S.A. § 6–4–308).

5. Appellant argues that § 3102 is an irrational exception to the general culpability requirements of the Crimes Code. In light of the widespread acceptance of the idea that mistake of age should not be a defense to a statutory rape conviction, § 3102 hardly can be termed irrational. Our Crimes Code shares its basic culpability requirements with the Model Penal Code on which it is based. The Model Penal Code, like the Pennsylvania statute, bars the defense of mistake of age where the female is below a designated age. Although the Model Penal Code sets the age at ten, Model Penal Code, Proposed Official Draft, §§ 213.1 and 213.6, pp. 142 and 149–150, certainly the legislature may, consistently with considerations of due process, determine as a matter of public policy that the still tender age of fourteen is appropriate. Furthermore, prior case law in Pennsylvania held that mistake of age was no defense to a charge of contributing to the delinquency of a minor, since it would not be a defense to a charge of statutory rape. *Commonwealth v. Sarricks*, 161 Pa.Super.Ct. 577, 56 A.2d 323 (1948). Thus, the legislature's determination to bar the defense was based on a long-standing and widely accepted principle of law and public policy, and may not be invalidated as irrational.

KAUFFMAN, Justice, dissenting.

I dissent from that part of the Court's opinion which upholds the constitutionality of Section 3102 of the Crimes Code.[1]

Appellant was precluded by Section 3102 from asserting as a defense to the charge of statutory rape undisputed evidence that the complainant deliberately misrepresented her age as sixteen and that appellant reasonably believed her misrepresentation.[2] Appellant was thus unfairly convicted of a serious felony on the basis of strict criminal liability without any showing of criminal intent, negligence or recklessness.

1. Act of December 6, 1972, P.L. 1462, No. 334, § 1, *as amended*, 18 Pa.C.S.A. § 3102. Section 3102 provides:

> § 3102. Mistake as to age
>
> Whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, *it is no defense that the actor did not know the age of the child, or reasonably believed the child to be the age of 14 years or older.* When criminality depends on the child's being below a critical age other than 14 years, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age.

18 Pa.C.S.A. § 3102 (Emphasis supplied).

2. The felony of statutory rape, which carries a penalty of up to ten years' imprisonment, is an offense based solely on the ages of the accused and the complainant. 18 Pa.C.S.A. § 3122. Section 3122 of the Crimes Code makes criminal sexual intercourse between a person eighteen years old or older and a person below the age of fourteen. *Id.* At the time of the incident leading to prosecution in this case, appellant was apparently eighteen, while complainant was thirteen and a half years old.

More than twenty years ago, this Court held that imprisonment on the basis of vicarious criminal liability without a showing of *mens rea* would deny due process of law under Article I, Section 9 of the Pennsylvania Constitution. *Commonwealth v. Koczwara*, 397 Pa. 575, 580, 155 A.2d 825, 829–830 (1959). *See Commonwealth v. Field*, 490 Pa. 519, 417 A.2d 160 (1980) (inferring culpability requirement for homicide by vehicle conviction). Today, however, the majority upholds a felony conviction where there not only has been no showing of *mens rea*, but the accused has been precluded from proving his assertion that he was misled to form the reasonable belief that he was committing no crime.[3]

Under the circumstances of this case, a felony conviction, carrying the possible penalty of a lengthy prison term, without a finding of criminal intent is unduly harsh and offensive to the due process protections of both the Pennsylvania and United States Constitutions. I agree with the enlightened view expressed by the appellate courts of several states that a felony conviction in circumstances similar to that presented here should not be obtained without some showing of criminal intent.[4] As the California Supreme Court has cogently stated:

> [I]f the [accused] participates in a mutual act of sexual intercourse, believing his partner to be beyond the age of consent, with reasonable grounds for such belief, where is his criminal intent? In such circumstances he has not consciously taken a risk. Instead he had subjectively eliminated the risk by satisfying himself on reasonable evidence that the crime cannot be committed. If it occurs that he has been misled, we cannot realistically conclude that for such reason alone the intent with which he understood the act suddenly becomes more heinous.

People v. Hernandez, 61 Cal.2d 529, 39 Cal. Rptr. 361, 393 P.2d 673, 676 (1964). *See also State v. Guest*, 583 P.2d 836 (Alaska 1978) (recognizing universal rule that conduct cannot be criminal unless the accused was conscious of some wrongdoing); *Walker v. State*, 356 So.2d 672 (Ala.1977) (due process restrains legislature's power to create strict liability crimes).[5]

Rather than summarily dismissing appellant's constitutional claim, as does the majority, I would hold unconstitutional that part of Section 3102 which denies an accused the opportunity to offer proof of reasonable belief as to age and remand this case to the trial court to permit appellant to raise as a defense his reasonable belief that the complainant's misrepresentation as to her age was true.[6]

LARSEN and FLAHERTY, JJ., join in this dissenting opinion.

3. It is undisputed that the complainant gave a false name to appellant, misrepresented her age and freely consented to the act of sexual intercourse giving rise to this prosecution.

4. While not deciding that every crime must be based on a finding of criminal intent, the United States Supreme Court has recognized that the Due Process Clause limits the power of state legislatures to establish strict liability offenses. *See Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957); *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1951).

5. Some states have expressed the same view through legislation. *See, e.g.*, Arizona, Ariz. Rev.Stat.Ann. § 13-1407(B); Arkansas, Ark. Stat.Ann. § 41-1802(3); Montana, Mont.Rev. Codes Ann. § 94-5-601.

6. This result would not require a finding that the statutory rape statute, Section 3122, is unconstitutional, but only that appellant must be permitted to show that he had been misled into believing that he was committing no crime.

399 A.2d 1084

COMMONWEALTH of Pennsylvania

v.

Vincent ROBINSON, Appellant.

Superior Court of Pennsylvania.

Submitted June 12, 1978.

Decided March 16, 1979.

Petition for Allowance of Appeal Granted June 1, 1979.

Defendant was convicted before the Court of Common Pleas, Criminal Trial Division, Philadelphia County, on In-

6. Although the majority affirms appellant's judgment of sentence, the author of this opinion wishes to note that he would have vacated the sentence and remanded the case for resentencing by the lower court. Appellant claimed that the lower court did not state reasons in support of its sentence. The official record transmitted to us did not contain transcripts of the sentencing or resentencing hearings held by the lower court, nor a copy of a presentence report. Nor did the opinion filed by the lower court pursuant to Pa.R.A.P. 1925 contain a statement of reasons in support of its sentence. Because the deficient state of the record precludes meaningful appellate review of the lower court's sentence, I believe that remand for resentencing is necessary. *See Commonwealth v. Bolyard*, 256 Pa. Super. 57, 389 A.2d 598 (1978).

EXHIBIT "B"

formation No. 1068, January Session, 1977, Lord, J., of statutory rape, and he appealed. The Superior Court, No. 2500 October Term, 1977, Spaeth, J., held that: (1) sufficient foundation was laid for introduction of defendant's sister's testimony in regard to his age at time of the charged offense; (2) evidence sufficiently established that defendant was over 18 on date of the incident; (3) statute prohibiting an accused from claiming, as a defense, that he reasonably believed sexual offense victim was 14 years or older if criminality of conduct depends on child being less than 14 years of age was not unconstitutional, and (4) such statutory provision was not invalid because it assertedly conflicted with several other statutory provisions.

Judgment of sentence affirmed.

1. Criminal Law ⇐560

Verdict of guilt may not be based on surmise or conjecture.

2. Criminal Law ⇐398(1)

Generally, best proof of age is testimony of living witnesses who were present at the birth and distinctly remember the event or who, though not present, were so situated as to have positive knowledge and remembrance of the date of birth.

3. Criminal Law ⇐421(3)

In prosecution for statutory rape, sufficient foundation for defendant's sister's testimony in regard to defendant's age at time of charged offense was provided by sister's testimony that she was 19 years older than defendant and that, though she was not present at his birth, she saw him three days later on certain date and that he was born in certain hospital. 18 Pa.C.S.A. § 3122.

4. Rape ⇐52(4)

Evidence in proceeding in which defendant was convicted of statutory rape sufficiently established that defendant was over 18 on the date of the incident. 18 Pa.C.S.A. § 3122.

5. Rape ⇐2

Statute prohibiting an accused from claiming, as a defense, that he reasonably believed sexual offense victim was 14 years or older if criminality of conduct depends on child being less than 14 years of age is not unconstitutional. 18 Pa.C.S.A. § 3102.

6. Rape ⇐2

Statute, which prohibits an accused from claiming, as a defense, that he reasonably believed rape victim was 14 years or older if criminality of conduct depends on child being less than 14 years of age, was not invalid due to fact that it allegedly conflicted with other statutory provisions, in light of fact that the statute prohibiting use of such a defense was a specific provision relating to sexual offenses and the other statutory provisions in question were previously enacted provisions dealing with general guidelines on culpability for the whole of the Crimes Code. 1 Pa.C.S.A. § 1933; 18 Pa.C.S.A. §§ 302, 304, 305, 3102.

John W. Packel, Assistant Public Defender, Chief, Appeals Division, Leonard Sosnov, Assistant Defender, Philadelphia, for appellant.

Robert B. Lawler, Assistant District Attorney, Chief, Appeals Division, Philadelphia, for Commonwealth, appellee.

Before JACOBS, President Judge, and HOFFMAN, CERCONE, PRICE, VAN der VOORT, SPAETH and HESTER, JJ.

SPAETH, Judge:

This is an appeal from judgment of sentence for statutory rape.[1]

The complainant testified that appellant had sexual intercourse with her on January 1, 1977, when she was 13 years

1. Section 3122 of the Crimes Code reads: "A person who is 18 years of age or older commits statutory rape, a felony of the second degree, when he engages in sexual intercourse with another person, not his spouse who is less than 14 years of age."

old. N.T. 14. The Commonwealth called appellant's sister, Yvonne Smith, for the purpose of proving appellant's age. She testified that she had personal knowledge that appellant was over 18 on January 1, 1977. As a foundation for this testimony, she stated that she was 19 years older than appellant; that she was not present at his birth, but saw him three days later, on November 12 or 13, 1958, N.T. 10, 11; that he was born in Abington Hospital; and, finally, that her mother's name was Doris and her father's name, Emanuel, N.T. 13. On cross-examination, she conceded that her estimation of appellant's age was an "approximation", based on how long she thought he had been out of school. N.T. 12. Later in the trial, appellant's counsel recalled Mrs. Smith as a witness on appellant's behalf and she testified that "his birthday is November 9th of this year [1977]. He should be 19, I guess." N.T. 36.

Appellant argued in his post-verdict motions, and argues to us, (1) that the Commonwealth failed to prove beyond a reasonable doubt that he was over 18 on the date of the incident, and (2) that Section 3102 of the Crimes Code[2] is unconstitutional because it does not allow a defendant to prove that he labored under a reasonable mistake of fact as to the age of the victim.

1

[1] It is axiomatic that "we must review the evidence in the light most favorable to the Commonwealth, the verdict winner, and accept every reasonable inference arising from that evidence in support of [its] position." *Commonwealth v. Wright*, 449 Pa. 358, 360, 296 A.2d 746, 747 (1972). It is also true, however, that "a verdict of guilt may not be based upon surmise or conjecture." *Commonwealth v. Farquhar-*

2. Section 3102 reads: "Whenever in this chapter [chapter 31] the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the actor did not know the age of the child, or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age other than 14 years, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age."

son, 467 Pa. 50, 60, 354 A.2d 545, 550 (1976). In applying these principles here, the critical question is whether the Commonwealth laid a sufficient foundation for the introduction of Yvonne Smith's testimony.

[2] There is a paucity of Pennsylvania case law as to what foundation must be laid before a witness may testify that another person is over a particular age. The general rule seems to be that "the best proof of age is the testimony of living witnesses who were present at the birth and distinctly remember the event, or who, although not present, yet were so situated as to have positive knowledge and remembrance of the date thereof." *Messina v. New York Life Ins. Co.*, 173 Miss. 378, 161 So. 462, 464 (1935); *see also Howard v. Kentucky Alcoholic Beverage C. Board*, 294 Ky. 429, 172 S.W.2d 46 (1943); *Harris v. Switchmen's Union of North America*, 237 S.W. 155 (Mo.App.1922); *Southern Ins. Co. v. Tate*, 22 Ala.App. 72, 112 So. 365 (1927). Some courts have cautioned that in admitting this type of evidence, "[m]uch must be left to the discretion of the trial judge . . . ." *McLoughlin v. Sheehan*, 250 Mass. 132, 145 N.E. 259, 261 (1924). In *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977), the Supreme Court of North Carolina was confronted with a problem similar to the one we face. It adopted "the rule that lay witnesses with an adequate opportunity to observe and who have in fact observed may state their opinion regarding the age of the defendant in a criminal case when the fact that he was at the time in question over a certain age is one of the essential elements to be proved by the state. It is important to note that the exact age of the defendant is not in issue, nor need the state prove it. It must prove only that he was at the time of the offense charged over 16." 292 N.C. at 287, 233 S.E.2d at 916.

[3, 4] We believe that the North Carolina Court's statement of the law is a good one, and that it has been met here. Although Yvonne Smith was not present at appellant's birth, her testimony, if accepted, showed that she was "so

situated as to have positive knowledge and remembrance of the date thereof."[3] In *Commonwealth v. Walker*, 234 Pa. Super. 433, 340 A.2d 858 (1975), *modified on other grounds*, 468 Pa. 323, 362 A.2d 227 (1976), the Commonwealth successfully proved that the appellant was over 16 by showing that he had told the prosecutrix that he was 21. We said there: "Although such evidence was not conclusive, it along with other facts and circumstances tended to prove that appellant was over the age of 16." 234 Pa.Super. at 435, 340 A.2d at 859.[4] Yvonnne Smith did on cross-examination qualify her statement of appellant's age as an "approximation", but this feature of her testimony was for the judge, sitting without a jury, to appraise. He could choose to accept her direct testimony that she first saw appellant on November 12 or 13, 1958, especially given her testimony, when she was recalled as a witness by appellant, that appellant would be 19 on "November 9th of this year [1977]", in other words, that he *had* been born in 1958, and therefore was 18 on January 1, 1977, when the incident in question here occurred. Her addition of the words, "I guess", to her statement on recall did reduce her testimony to mere surmise;

3. There are other ways the Commonwealth might have proved appellant's age, but they were perhaps not practical in this instance. Yvonne Smith testified that her mother was sick; she may therefore have been unable to testify about appellant's age. N.T. 12. The record is not clear whether the Commonwealth tried to procure appellant's birth certificate, but failed.

4. It is not apparent whether the evidence in *Walker* was stronger or weaker than in the present case. A person's statement about his date of birth is based on hearsay in that someone or some document must have told him when he was born. If the statement is admitted as an admission by a party—which seems to have been so in *Walker* —there may be no inquiry as to its reliability, for an admission comes in simply because it *is* an admission. If the statement is admitted as within the pedigree exception to the hearsay rule, *see* McCormick, Evidence § 322 (2d Ed. 1972), this will be in recognition of the fact that in most cases the family member who dispensed the information in question was truthful, or at least had no motive not to be; but there are bound to be cases where family members make mistakes about vital information of others in the family, even when they have gained their knowledge firsthand and not from a birth certificate.

again, it was for the judge to appraise the extent of this qualification.[5]

2

Appellant's argument that Section 3102 is unconstitutional breaks down into several parts. First, appellant argues that because Section 3102 prohibits him from claiming that he reasonably believed that the victim was 14 years or older, it results in the imposition of strict liability and should therefore be declared invalid under the Pennsylvania Constitution by virtue of *Commonwealth v. Koczwara*, 397 Pa. 575, 155 A.2d 825 (1959), *cert. denied* 363 U.S. 848, 80 S.Ct. 1624, 4 L.Ed.2d 1731 (1960). Second, appellant argues that federal constitutional principles require that the section be declared invalid. Finally, appellant argues that the section is invalid because it conflicts with several other provisions of the Crimes Code.

[5, 6] We find no constitutional invalidity. *Commonwealth v. Koczwara, supra*, is distinguishable. There, the Supreme Court held that a barowner could not be imprisoned where he was vicariously liable for an employee's service of liquor to minors. 397 Pa. at 586, 155 A.2d at 838. Appellant is not being held liable for anyone else's actions. Appellant has cited no case that demonstrates a federal constitutional claim. The Court of Appeals for the First Circuit has stated:

> The Supreme Court has never held that an honest mistake as to the age of the prosecutrix is a constitutional defense to statutory rape, and nothing in the Court's recent decisions clarifying the scope of procreative privacy, suggests that a state may no longer place the risk of a mistake as to the prosecutrix's age on the person engaging

5. Appellant finds this case like *Commonwealth v. Bennett*, 224 Pa. Super. 238, 303 A.2d 220 (1973). There, we were confronted with a witness whose testimony was "'so contradictory on the essential issues that any finding by the jury would be a mere guess . . . when the testimony is so contradictory on the basic issues as to make any verdict based thereon pure conjecture . . . the jury should not be permitted to consider it'." 224 Pa.Super. at 240, 303 A.2d at 221 (citation omitted). This is not such a case.

in sexual intercourse with a partner who may be young enough to fall within the protection of the statute. (citations omitted) *Nelson v. Moriarty*, 484 F.2d 1034, 1035–1036 (1st Cir.1973).

Nor is appellant's final argument persuasive. Appellant argues that Section 3102 is in conflict with Sections 302,[6] 304,[7] and 305[8] of the Crimes Code. These provisions deal with general guidelines on culpability for the whole of the

6. Section 302 in pertinent part reads: "Minimum requirements of culpability.—Except as provided in section 305 of this title (relating to limitations on scope of culpability requirements), a person is not guilty of an offense unless he acted intentionally, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense."

7. Section 304 reads: "Ignorance or mistake as to a matter of fact, for which there is reasonable explanation or excuse, is a defense if:
(1) the ignorance or mistake negatives the intent, knowledge, belief, recklessness, or negligence required to establish a material element of the offense; or
(2) the law provides that the state of mind established by such ignorance or mistake constitutes a defense."

8. Section 305 reads:
§ 305. Limitations on scope of culpability requirements
(a) When culpability requirements are inapplicable to summary offenses and to offenses defined by other statutes.—The requirements of culpability prescribed by section 301 of this title (relating to requirement of voluntary act) and section 302 of this title (relating to general requirements of culpability) do not apply to:
(1) summary offenses, unless the requirement involved is included in the definition of the offense or the court determines that its application is consistent with effective enforcement of the law defining the offense; or
(2) offenses defined by statutes other than this title, in so far as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears.
(b) Effect of absolute liability in reducing grade of offense to summary offense.—Notwithstanding any other provision of existing law and unless a subsequent statute otherwise provides:
(1) when absolute liability is imposed with respect to any material element of an offense defined by a statute other than this title and a conviction is based upon such liability, the offense constitutes a summary offense; and
(2) although absolute liability is imposed by law with respect to one or more of the material elements of an offense defined by a

Crimes Code, while we are confronted with the task of interpreting and applying a specific provision on sexual offenses. The Supreme Court has said: "It is a familiar rule that where there is a conflict between two provisions of a statute, one of which is specific and the other merely general, the specific provisions thereof will control unless it is clear that the legislature intended otherwise, or some other canon of statutory construction compels a contrary conclusion." *Wait's Estate*, 336 Pa. 151, 154, 7 A.2d 329, 330 (1939). Likewise, the Statutory Construction Act provides:

> Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.
>
> 1 Pa.C.S.A. § 1933 (Purdon's Supp.1978–79).[9]

Section 3102, as amended in 1976, which was three years after the sections on which appellant relies were enacted, represents a clear legislative desire that with respect to certain sexual offenses, a defendant cannot prove his reasonable belief regarding the victim's age as a defense.

Judgment of sentence affirmed.

JACOBS, former President Judge, and HOFFMAN, J., did not participate in the consideration or decision in this case.

> statute other than this title, the culpable commission of the offense may be charged and proved, in which event negligence with respect to such elements constitutes sufficient culpability and the classification of the offense and the sentence that may be imposed therefor upon conviction are determined by section 106 of this title (relating to classes of offenses) and Chapter 11 of this title (relating to authorized disposition of offenders).
> 1972, Dec. 6, P.L. 1482, No. 334, § 1, eff. June 6, 1973.

9. Appellant says that 1 Pa.C.S.A. § 1933 (Purdon's Supp.1978–79) is only applicable where two statutes are in conflict. While this is true, we think it gives guidance in the situation before us.

COMMONWEALTH	:	COURT OF COMMON PLEAS
	:	
vs	:	JANUARY TERM, 1977
	:	
VINCENT ROBINSON	:	NO. 1068

O P I N I O N

This opinion is written after a denial of defendant's post trial motion. There is no merit to any of the reasons alleged for the grant of the motion.

There was ample evidence of the age of the complaining witness and until this court is told differently, it is not in a position to reject the rule of COMMONWEALTH V. JOYCE, 316 Pa. 434 (1934) which permits a witness to state his own age. The court sitting without a jury ignored any alleged improper actions of the district attorney and a simple summary of the evidence was: defendant had intercourse with a consenting girl under the age of fourteen.

Defendant's argument respecting the unconstitutionality of Sec. 3102 of the Crimes Code (18 P.S. 3102) which provides that mistake as to age is no defense, is novel and somewhat persuasive as a sociological argument against the advisability of the statute. However, it does not convince this court that the statute is unconstitutional. COMMONWEALTH V. GRANT, 235 Pa. Super. Ct. 357, 364-365 (1975) states:

> "Ordinarily criminal intent or guilty knowledge is an essential element of a criminal offense. Commonwealth v. Junkin, 170 Pa. 194, 32 A. 617 (1895); Commonwealth v. Weiss, 139 Pa. 247, 21 A. 10 (1891); Commonwealth v. Morakis, 208 Pa. Superior Ct. 150, 220 A.2d 900 (1966); Commonwealth v. Fine, 166 Pa. Superior Ct. 109, 70 A.2d 677 (1950). However, the legislature may define a crime so that proof of criminal intent or guilty knowledge is not necessary. Commonwealth v. Morakis, supra; Commonwealth v.

EXHIBIT "C"

Fine, supra. 'It is for the legislature to determine whether the public injury, threatened in any particular matter, is such and so great as to justify an absolute and indiscriminating prohibition.' Commonwealth v. Koczwara, 397 Pa. 575, 582, 155 A. 2d 825, 829 (1959), cert. denied, 363 U.S. 848 (1960), quoting from Commonwealth v. Weiss, supra at 251, 21 A. at 10.

This argument along with the argument that mistake as to age is a defense to deviate sexual intercourse and not to statutory rape should be addressed to the legislature.

BY THE COURT:

CHARLES A. LORD J.

11/5/77

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SUPREME COURT
EASTERN DISTRICT

DEFENDER ASSOCIATION OF PHILADELPHIA
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LEONARD SOSNOV, Assistant Defender
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(215) 568-3190

Attorney for VINCENT ROBINSON

VINCENT ROBINSON, Appellant	IN THE SUPREME COURT OF PENNSYLVANIA - EASTERN DISTRICT
VS.	JANUARY TERM, 1979
COMMONWEALTH OF PENNSYLVANIA	NO. 236

NOTICE OF APPEAL OF THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Vincent Robinson, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Pennsylvania, affirming the judgment of sentence and conviction, entered herein on December 30, 1981 in Commonwealth of Pennsylvania v. Robinson.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

Counsel For Appellant

EXHIBIT "D"

DEFENDER ASSOCIATION OF PHILADELPHIA
BY: Benjamin Lerner, Defender, and
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121 North Broad Street
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Attorney for VINCENT ROBINSON

VINCENT ROBINSON,
Appellant

VS.

COMMONWEALTH OF PENNSYLVANIA

IN THE COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION

JANUARY TERM, 1977

NO. 1068

NOTICE OF APPEAL OF THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Vincent Robinson, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Pennsylvania, affirming the judgment of sentence and conviction, entered herein on December 30, 1981 in Commonwealth of Pennsylvania v. Robinson.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

Counsel For Appellant

EXHIBIT "E"

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SUPREME COURT, U.S.

NUMBER

IN THE SUPREME COURT OF THE UNITED STATES

VINCENT ROBINSON, :
APPELLANT

VS. : OCTOBER TERM, 1982

COMMONWEALTH OF PENNSYLVANIA :

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL

Appellant, Vincent Robinson, by his counsel, John W. Packel, Defender Association of Philadelphia, moves pursuant to Supreme Court Rule 46.1 to proceed in forma pauperis and respectfully represents:

1. Appellant was arrested on January 3, 1977, and because he was an indigent without sufficient funds, present counsel, Defender Association of Philadelphia was appointed by the Common Pleas Court of Philadelphia to represent him.

2. Appointed counsel, Defender Association of Philadelphia, has represented appellant continuously in the state courts of Pennsylvania since his arrest.

3. This appeal is being filed on behalf of appellant to fulfill counsel's duty to give appellant, an indigent defendant, complete and effective assistance of counsel.

WHEREFORE, appellant respectfully requests that he be permitted to file the accompanying appeal in forma pauperis.

Respectfully submitted,

JOHN W. PACKEL, Assistant Defender
Chief, Appeals Division
BENJAMIN LERNER, Defender

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NUMBER

IN THE SUPREME COURT OF THE UNITED STATES

VINCENT ROBINSON,
APPELLANT :

VS. : OCTOBER TERM, 1982

COMMONWEALTH OF PENNSYLVANIA :

AFFIDAVIT OF COUNSEL IN SUPPORT OF
MOTION TO PROCEED IN FORMA PAUPERIS

I, John W. Packel, being first duly sworn, depose and say that I am counsel for appellant in the above-entitled case and represent the following:

1. Counsel is employed by the Defender Association of Philadelphia, a non-profit organization which provides representation for indigents accused of crimes in Pennsylvania.

2. Appellant was determined to be indigent by the Courts of Philadelphia and counsel was appointed, representing appellant at trial and in the Superior and Supreme Courts of Pennsylvania.

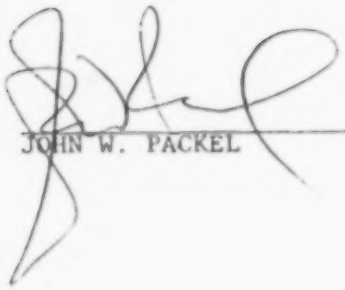
3. Counsel believes that appellant is entitled to redress.

4. Counsel believes that appellant, because of his poverty, is unable to pay the costs of this proceeding or to give security therefor.

5. Counsel is submitting this affidavit on appellant's behalf, because appellant is now a member of the armed forces in Germany, and counsel, as of the present time, has not been able to obtain a personal affidavit from appellant first because of difficulties in determining his exact location, and now because of delays involved in communicating with him.

6. Counsel will, as promptly as possible, obtain an affidavit from appellant reflecting his present financial

situation and further supporting the request to proceed in forma pauperis.



JOHN W. PACKEL

Motion to Dismiss or Affirm

Supreme Court, U.S.
FILED
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NO. 81-6294

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

VINCENT ROBINSON, Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA (PENNSYLVANIA SUPREME COURT NO. 236, JANUARY TERM, 1979)

MOTION OF APPELLEE TO AFFIRM

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April 22, 1982

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MOTION TO AFFIRM

Appellee Commonwealth of Pennsylvania, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the order of the Supreme Court of Pennsylvania, affirming appellant's judgment of sentence, be affirmed on the ground that the question is so insubstantial as not to warrant further argument.

QUESTION PRESENTED

Is the enactment of 18 Pa.C.S.A. §3102, barring the defense of mistake of the victim's age in a statutory rape prosecution, a valid exercise of legislative judgment?

STATEMENT OF THE CASE

Defendant Vincent Robinson appeals from the December 30, 1981, order of the Supreme Court of Pennsylvania, affirming the judgment of sentence imposed upon him for the crime of statutory rape. The factual and procedural history of this appeal is as follows:

Defendant was arrested on January 3, 1977, on charges arising out of an incident two days earlier. Following a preliminary hearing, the Commonwealth of Pennsylvania, through the District Attorney of Philadelphia County, returned against defendant Bill of Information No. 1068, January Session, 1977, charging statutory rape.[1] Defendant waived

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[1]The crime of statutory rape is defined as follows:

> A person who is 18 years of age or older commits statutory rape, a

(Footnote 1 continued on next page.)

his right to trial by jury, and was tried by the Honorable Charles A. Lord, on April 6, 1977.

The evidence presented by the Commonwealth at trial established that on January 1, 1977, Harriet Saunders, along with a girlfriend, went to a poolhall in Philadelphia, where she met defendant and two of his friends. Harriet was thirteen years old at the time, her date of birth being July 23, 1963. She told defendant, however, that she was sixteen years old (N.T. 4/6/66, 23-25).

(Footnote 1 continued from previous page.)

> felony of the second degree, when he engages in sexual intercourse with another person not his spouse who is less than 14 years of age.

18 Pa.C.S.A. §3122. A felony of the second degree is punishable by a term of imprisonment for not more than ten years, 18 Pa. C.S.A. §1103(2), and by a fine of not more than $25,000, 18 Pa.C.S.A. §1101(1).

Defendant, who was eighteen years of age, invited Harriet to his house, and there gave her wine and marijuana. Harriet Saunders then consented to have sexual intercourse with defendant (N.T. 4/6/77, 16-21). After leaving defendant's house, Harriet went to her girlfriend's home and then to Thomas Jefferson University Hospital, where she was examined and released (N.T. 4/6/77, 23).

Defendant demurred to this evidence, arguing that he had reasonably believed that Harriet Saunders was sixteen, and thus should not be held criminally liable. The trial court, citing the Pennsylvania statute which bars from statutory rape prosecutions a defense of mistake as to the victim's age,[2]

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[2]That statute provides:

> Whenever in this chapter the criminality of conduct depends on a

(Footnote 2 continued on next page.)

denied the demurrer and subsequently convicted defendant of statutory rape. Following the denial of motions in arrest of judgment and for a new trial, Judge Lord sentenced defendant to two years probation.

Defendant appealed the judgment of sentence to the Pennsylvania Superior Court, which unanimously affirmed. Commonwealth v. Vincent Robinson, 264 Pa. Superior Ct. 345, 399 A.2d 1084 (1979) (opinion by Spaeth,

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(Footnote 2 continued from previous page.)

> child being below the age of 14 years, it is no defense that the actor did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age other than 14 years, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age.

18 Pa.C.S.A. §3102.

J.). Defendant sought, and was granted, permission to appeal to the Pennsylvania Supreme Court, pursuant to 42 Pa.C.S.A. §724. After the filing of briefs and oral argument, the judgment of sentence was again affirmed, by a majority of four to three. Commonwealth v. Vincent Robinson, 438 A.2d 964 (Pa. 1981) (majority opinion by Nix, J.).

This appeal, pursuant to 28 U.S.C. §1257(2), followed. Defendant renews his claim, which was rejected by the trial court and both Pennsylvania appellate courts, that 18 Pa.C.S.A. §3102, removing the defense of mistake of fact, denied him due process of law in violation of the fourteenth amendment to the United States Constitution.[3]

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[3]The Pennsylvania courts likewise rejected defendant's claim that the statute violates article I, §9 of the Pennsylvania Constitution. Commonwealth v. Vincent Robinson, supra, 438 A.2d at 966-67; Commonwealth v. Vincent Robinson, supra, 264 Pa. Superior Ct. at 351-52, 399 A.2d at 1087.

ARGUMENT

The decision of the Pennsylvania Supreme Court is plainly correct. Defendant contends that 18 Pa.C.S.A. §3102, which provides that it is no defense to a charge of statutory rape that the defendant reasonably believed the victim to be fourteen years of age or older, denied him due process of law by allowing a conviction for statutory rape without a showing of mens rea in violation of the fourteenth amendment to the United States Constitution. It is clear, however, that the statute at issue is a proper exercise by the legislature of its police power and does not offend due process.

Legislative enactments are presumed to be constitutionally valid. Flemming v. Nestor, 363 U.S. 603, 80 S. Ct. 1367, rehearing denied, 364 U.S. 854, 81 S. Ct. 29 (1960);

Commonwealth v. Sutley, 474 Pa. 256, 260-61, 378 A.2d 780, 782 (1977). Further, the touchstone of due process is protection of the individual against arbitrary action of the government. Wolff v. McDonnell, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976 (1974). Here, to protect the health and welfare of children thirteen years of age and younger, the Pennsylvania legislature has mandated that one eighteen years of age or older who engages in sexual intercourse with such a young child does so at his own peril. It has chosen to afford that protection to young children by punishing this conduct regardless of the actor's belief as to the child's age. This legislation is not an arbitrary law and is rationally related to a legitimate state interest. Similar statutory rape provisions are common and of ancient origin.

It has long been held that the state may provide that a person who does a particular act shall do so at his peril, and will not be heard to plead ignorance. United States v. Balint, 258 U.S. 250, 252, 42 S. Ct. 301, 302 (1922); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 69-70, 30 S. Ct. 663, 666-67 (1910). Although due process imposes some limitation on the absence of a knowledge requirement from the definition of a criminal offense, Lambert v. California, 355 U.S. 225, 78 S. Ct. 240 (1957), the instant statutory provision, unlike that struck down in Lambert, does not contain a trap for the unwary. The due process violation in Lambert was founded in an absence of notice; California's unconstitutional criminal registration ordinance punished the failure to register although no notice to register was given any person subject

to the ordinance.[4] Here, by contrast, the statute requires a voluntary act, which carries with it notice to conform one's actions to the law.

Indeed, the only federal court which has considered the due process claim raised here found no constitutional infirmity in denying to a statutory rape defendant the defense of mistake of age. Nelson v. Moriarty, 484 F.2d 1034 (1st Cir. 1973). Every state court

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[4]The Pennsylvania Supreme Court has found a similar due process limitation in the definition of a criminal offense. In Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825 (1959), cert. denied, 363 U.S. 848, 80 S. Ct. 1624 (1960), the Court held that a bar owner could not be imprisoned where he was held vicariously liable for the act of an employee. As the Pennsylvania Supreme Court noted in its opinion here, the due process limits imposed by Koczwara are significantly different from the due process limits urged by defendant. Commonwealth v. Vincent Robinson, supra, 438 A.2d at 967 n.3.

which has considered a similar claim has found no violation of due process. Commonwealth v. Moore, 359 Mass. 509, 269 N.E.2d 636 (1971); Goodrow v. Perrin, 119 N.H. 483, 403 A.2d 864 (1979); State v. Moore, 105 N.J. Super. 567, 253 A.2d 579, certif. denied, 54 N.J. 502, 257 A.2d 103 (1969); People v. Dozier, 72 N.Y. App. Div.2d 478, 424 N.Y.S.2d 1010 (1st Dept.), aff'd, 52 N.Y.2d 781, 436 N.Y.S.2d 620 (1980).

These courts, like the Pennsylvania Supreme Court, correctly rejected these due process challenges. The Pennsylvania Supreme Court noted in its opinion that the purpose behind the statutory rape law is "to protect those who are too unsophisticated to protect themselves." Commonwealth v. Vincent Robinson, supra, 438 A.2d at 966; see Commonwealth v. Walker, 468 Pa. 323, 335, 362 A.2d 227, 232 (1976). The state has reasonably determined

that to allow the defense of mistake of age in statutory rape prosecutions would defeat the very purpose of the statute. This judgment is one properly made by the legislature.[5] The determination to make criminal an act of sexual intercourse with one under fourteen

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[5] Indeed, the Model Penal Code, on which the Pennsylvania Crimes Code is based, see Commonwealth v. Vincent Robinson, supra, 438 A.2d at 967 n.5, supports the need for §3102. It bars the defense of mistake of age in statutory rape prosecutions where the victim is below the age of ten, Model Penal Code, Proposed Official Draft, §§213.1 and 213.6, pp. 142 and 149-50, although it eschews the imposition of absolute liability for other crimes. Model Penal Code, Tentative Draft No. 4, §2.05, Comment, p. 140. The Pennsylvania Supreme Court declined to substitute its judgment for that of the Pennsylvania legislature which determined that fourteen is a more appropriate age limitation than ten. This public policy, to set the age at fourteen rather than ten, certainly does not violate due process. See Commonwealth v. Vincent Robinson, supra, 438 A.2d at 967 n.5.

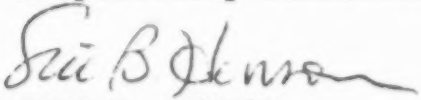
regardless of the actor's belief as to the victim's age does not violate due process.

Given the unquestionably proper purpose of 18 Pa.C.S.A. §3102, and the unanimous rejection of due process challenges to similar statutes, it is clear that the decision of the Supreme Court of Pennsylvania, upholding the constitutionality of the statute, is correct. Therefore, the question presented in the instant appeal is so insubstantial as not to warrant further argument.

CONCLUSION

For the reasons stated herein, this appeal should be affirmed.

Respectfully submitted,



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IN THE SUPREME COURT
OF THE UNITED STATES

VINCENT ROBINSON, Appellant	:	OCTOBER TERM, 1981
v.	:	
COMMONWEALTH OF PENNSYLVANIA, Appellee	:	NO. 81-6294

CERTIFICATION OF SERVICE

I, ERIC B. HENSON, Counsel for Appellee, hereby certify that I have served three (3) copies of this Motion of Appellee to Affirm by hand delivery upon counsel for appellant, John W. Packel, Esquire, Defender Association of Philadelphia, 121 North Broad Street, Philadelphia, Pennsylvania, 19107, on April 22, 1982.

Eric B. Henson

ERIC B. HENSON

Sworn to and subscribed :
before me this 22nd day :
of April, 1982, A.D. :

Carol D. Eden

NOTARY PUBLIC

My Commission Expires:

CAROL D. EDEN
Notary Public, Phila., Phila. Co.
My Commission Expires March 11, 1985